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OFFICE OF GENERAL
COUNSEL

June 11, 2010

1007444801
Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6275

Dear Mr. Jordan:

The undersigned represent the respondents, Eric Massa, his campaign committee, Massa for Congress (the "Committee"), and Beverly Massa, as treasurer.

This matter was generated by a Complaint filed by the National Legal and Policy Center based on news stories and the Committee's Commission filings. Complaint at 1. At bottom, the Complaint alleges two separate and distinct actions violated the campaign finance election laws. Complaint at 7. First, the Complaint alleges that the Committee made a \$31,896.42 payment for a vehicle previously leased for campaign activity and speculates that this payment might have violated the Commission's personal use regulation, 2 U.S.C. § 439a(b), 11 CFR 113.2(e). *Id.* Second, the Complaint alleges that the Committee made a \$40,000 payment to Joseph Racalto. *Id.* But the Complaint does not even argue that this payment violated any Commission regulation or statute administered by the Commission. *Id.* Instead, the Complaint suggests that the payment is "questionable," and suggests possible violations of regulations not administered by the Commission. *Id.*

As described in more detail below, even if the facts asserted in the Complaint are true, the Complaint has not asserted a violation of the Federal Election Campaign Act (FECA) or the Commission's regulations thereunder. With respect to the first allegation, the Complaint does not allege that the vehicle was not leased and used for campaign activity. Specifically, there is no allegation that the vehicle was ever used for any personal use by Congressman Massa or anyone else. Hence, there is no allegation of a violation of the Commission's personal use regulations. In fact, no personal use of the vehicle has occurred. With respect to the second allegation, the

Complaint does not allege that the payment to Mr. Racalto was a violation of FECA. Rather, the Complaint alleges that a payment was made by the Committee and properly reported. Even if the payment was questionable with respect to non-FECA violations, it was properly reported pursuant to the FECA and, therefore, not a violation of FECA. Since Mr. Racalto is not a candidate or a relative of a candidate, there is no implication of a violation of the Commission's personal use regulations or any other provision of the Federal Election Campaign Act or Commission regulation.

DISCUSSION: VEHICLE DISBURSEMENT

Eric Massa was elected to represent the 29th Congressional District of New York in 2008. On March 3, 2010, he announced that he would not seek re-election, and on March 5th he announced his resignation from the House of Representatives.

In September of 2009, the Committee purchased a vehicle for campaign use and reported making five payments on the vehicle pursuant to a financing agreement. *Id.* at 2. Subsequently, the Committee's April 15, 2010 Quarterly Report disclosed a \$31,896.42 disbursement to GMAC for a "campaign car lease" on March 3rd. *Id.* Because Cong. Massa had announced that he was not seeking re-election, the complainant speculated that the Committee purchased the vehicle for Cong. Massa's personal use after he left Congress. Significantly, no allegation was made that Cong. Massa had used or was using the vehicle for personal use.

The Complaint alleges, at best, that there might be a future violation of the personal use regulation. However, such speculation about an event that might take place in the future is insufficient for a complaint to the Commission. A Commission complaint requires a sworn statement, "under penalty of perjury," by a "person who believes a violation of this Act ... has occurred." 2 U.S.C. § 437g(a)(1) (emphasis supplied). The National Legal and Policy center complaint does not provide evidence or even allege a violation "has occurred." *Id.*

Moreover, there is no reason to assume a violation will occur. The Committee determined that it was in its best economic interest to purchase the vehicle pursuant to its financing contract in order to avoid paying additional interest on the vehicle. Ultimately, in late April of 2010, Mr. Massa purchased the vehicle from the campaign at fair market value.² The Commission should not second guess such a decision and, in any event, the purchase and re-sale of the vehicle at fair market value is not a violation of the Commission's person use regulations. *Cf.* AO 1986-14, see also AO 1992-24 and 1990-26.

Furthermore, even if FECA permitted complaints that a future violation might occur, this Complaint has not described a potential violation of FECA the respondents. The complainant is wrong to suggest that any use of the vehicle after Cong. Massa resigns is *per se* a personal use. As described above, a re-sale, even to Cong. Massa at fair market value, would not be a violation of the personal use regulations. In addition, any use of the vehicle to wind down his duties as a

¹ The committee inadvertently, and incorrectly referred to the car payments as a car lease payment. As explained above, all car payments were in connection with a purchase financing agreement and the car was not leased.

² Fair market value was determined by consulting Kelley Blue Book online (www.kbb.com) and determining the trade-in value for the comparable vehicle.

Congressman is not a personal use. Cf. AO 1996-44 at 2; AO 1996-14. Attached as Exhibit A, please find Declarations from Eric and Beverly Massa that attest that neither Mr. or Mrs. Massa, or any other member of the Massa family had ever used the purchased vehicle for personal use and that the vehicle was used by Mr. Massa and his staff exclusively for campaign and official use.

Thus, the disbursement to exercise the contractual option to pay off the balance due for the vehicle does not describe a past violation of FECA and is insufficient for a complaint pursuant to 2 U.S.C. § 437g(a)(1). Furthermore, even if a future violation were sufficient, the Complaint's suggestion of a *per se* future violation of the Commission's personal use regulation is incorrect. Accordingly, the vehicle purchase allegation should be dismissed.

DISCUSSION: RACALTO DISBURSEMENT

The Complaint recites that the Committee reported making a \$40,000 disbursement to Joseph Racalto for campaign related activity. The Complaint also quotes various journalists who speculated that the disbursement raises questions in their minds about the reason for the disbursement, and one news story speculated about a violation of a Congressional rule. However, neither the Complaint nor any of the journalists raised any questions about a violation of the FECA or the regulations thereunder. Nor, can there be a violation. The FECA only requires that the Committee report its disbursements, and the Complaint actually alleges that the Committee has done so.

Furthermore, there is no basis for the speculation in the Complaint that there is a violation of FECA when a committee of a congressman, who is not running for re-election, makes a payment to employ staff or a consultant. The Commission concluded in 1978 and repeated in 1993 that excess campaign funds of such a congressman's committee may be used "to employ staff and pay 'incidental expenses.'" AO 1993-6 citing AO 1978-43.

Specifically, the Complaint speculates that the payment to Racalto "appears to be improper" in six ways. Complaint at 6.

- The first two assertions the payment was allegedly improper are that "Racalto has failed to disclose a copy of a [employment] contract," and unidentified committee staffers "have said they were unaware of any contract. *Id.* Neither of these allegations are a violation of FECA because the Commission's regulations do not require Racalto to make any disclosures and do not require committee's to have or retain employment contracts.
- The third allegation is that "there is no indication of Racalto receiving reimbursement for travel" or other expenses. *Id.* But the Complaint does not allege that such expenses existed. Indeed, the thrust of the Complaint suggests that the complainant does not believe such expenses exist.
- Fourth, the Complaint refers to news stories that allege Racalto stated that the payment was for 15 months "of work for the campaign." *Id.* The complainant questions whether Racalto's statement is true. Whether this is true or not is irrelevant under FECA, which only requires reporting of the disbursement. Furthermore, FECA does not apply to Racalto's statements.

- The last two allegations are that the payment might have violated two rules of the House of Representatives by Racialto; but there is no allegation of a FECA violation. *Id.*

The Committee acknowledges that Mr. Racialto was entitled to some amount of payment for services to the campaign. The Committee has publicly stated that the amount of the \$40,000 was not "authorized" by Mr. Massa and has demanded that Mr. Racialto return the funds and that the committee and Mr. Racialto mutually agree on an appropriate amount of compensation for his work for the campaign. Since Mr. Racialto is not a candidate or a member of the candidate's family, this dispute does not implicate any provision of the FECA or the Commission's regulations. The Committee hopes to amicably resolve this dispute with Mr. Racialto in the near future.

Accordingly, the Racialto payment allegation, having failed to allege a violation of FECA, should be dismissed.

CONCLUSION

The Complaint by the National Legal and Policy Center is analogous to the complaints filed by Common Cause and Judicial Watch, Inc., which were dismissed by the Commission for failure to state a violation of the FECA. The dismissals were upheld for lack of standing in *Common Cause v. FEC*, 108 F. 3d 413 (D.C. Cir. 1997) and *Judicial Watch, Inc. v. FEC*, 180 F. 3d 277 (D.C. Cir. 1999), respectively, which is analogous to and confirmed the Commission's decisions. In the complaints filed by the watch dog groups, Common Cause and Judicial Watch, Inc., like the Complaint filed by the National Legal and Policy Center, there was no allegation or only a nominal allegation of a reporting violation. *Common Cause*, 108 F. 3d at 418; *Judicial Watch, Inc.*, 180 F. 3d at 278. Indeed, the allegations in all of three complaints were based on information filed in Commission reports. *Id.* Rather, the National Legal and Policy Center's real desire, like Common Cause and Judicial Watch, Inc., is "for the Commission to 'get the bad guys,' rather than disclose information." *Id.* As confirmed by the D.C. Circuit, the Commission should dismiss such complaints.

For all of the reasons described above, the Commission should find no reason to believe any violation of the FECA occurred, the Complaint should be dismissed, and the Commission should close the file.

Respectfully submitted,



Joseph Sandler
Neil P. Reiff
Stephen E. Hershkowitz

Counsel for Eric Massa,
Massa for Congress and
Beverly Massa, as treasurer